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Anderson v. St. Francis-St. George Hospital: Wrongful Living from an American and Jewish Legal Perspective

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ANDERSON v. ST. FRANCIS-ST. GEORGE HOSPITAL: WRONGFUL LIVING FROM AN AMERICAN AND JEWISH LEGAL PERSPECTIVE

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Edward Winter, an eighty-two-year-old man who suffered from chronic heart disease, entered St. Francis-St. George Hospital in Ohio after he lost consciousness at a senior citizen center.[4] On the same day of his admission, in the presence of his daughter, he communicated to his personal physician that he did not want to be treated with extraordinary life-saving measures in the event of further illness.[5] He had observed his wife's treatment in an intensive care unit, which included having her heart shocked and chest beaten, and he did not want the same thing done to him.[6] His physician placed an order in his chart to provide for "no code blue," indicating Winter's desire not to be resuscitated. However, Winter remained on cardiac monitoring equipment.[7]

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[4]Anderson v. St. Francis-St. George Hosp., Inc., 671 N.E.2d 225 (Ohio 1996).

[5]Anderson v. St. Francis-St. George Hosp., Inc., No. C-930819, 1995 WL 109128, at *2 (Ohio Ct. App. Mar. 15, 1995).

[6]*Id.* at *2.

[7]*Anderson*, 671 N.E.2d at 226.

Three days later, Winter suffered a life-threatening irregular heart rhythm. Despite the "no code blue" order, a nurse defibrillated Winter by electrically shocking his heart with paddles.[8] Winter survived, only to suffer a stroke two days later which left his right side paralyzed.[9] He was then transferred to a nursing home, unable to walk, incontinent, speaking with difficulty, and needing assistance with bathing and dressing.[10] He never regained the capability to care for himself, and he spent much of the rest of his life being cared for at home by nurses and his daughters. Finally he returned to a nursing home, where he died in April of 1990, nearly two years after the unwanted resuscitation.[11]

While still alive, Winter filed a lawsuit against the hospital for damages resulting from the hospital's failure to obey the "no code blue" order.[12] In addition to relying on the traditional torts of battery and negligence, Winter also alleged a novel cause of action for prolonging a person's life with an unwanted resuscitation, "wrongful living."[13]

Winter's last year, spent among nurses and medical equipment, remains but one example of the frequent collision between people's legal right to control the manner of their own death and the medical community's increasing ability to forestall death. An individual's right to refuse medical treatment is recog-

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[8] *Id.*

[9] *Id.*

[10] *Anderson*, 1995 WL 109128, at *3.

[11] *Id.*

[12] After Winter died, the administrator of Winter's estate, Keith B. Anderson, amended the complaint to substitute himself as plaintiff. *Anderson*, 671 N.E.2d at 225.

[13] The wrongful living cause of action was first developed by Samuel Oddi in his article entitled *The Tort of Interference with Right to Die: The Wrongful Living Cause of Action*, 75 GEO. L.J. 625 (1986). *See also* William Knapp & Fred Hamilton, *Wrongful Living: Resuscitation as Tortious Interference with a Patient's Right to Give Informed Refusal*, 19 N. KY L.R. 253 (1992); Tricia Jonas Hackelman, Comment, *Violation of an Individuals Right to Die: The Need for a Wrongful Living Cause of Action*, 64 U. CIN. L. REV. 1355 (1996). Many courts have addressed the right of a patient to refuse life sustaining medical treatment. *See* Cruzan v. Harmon, 760 S.W.2d 408 (Mo. 1988); Lovato v. Dist. Ct., 601 P.2d 1072 (Colo. 1979); John F. Kennedy Mem'l Hosp. v. Bludworth, 452 So. 2d 921 (Fla. 1984); *In re* L.H.R., 321 S.E.2d 716 (Ga. 1984); *In re* PVW, 424 So.2d 921 (La. 1982); *In re* Quinlan, 355 A.2d 647 (N.J. 1976); Garger v. New Jersey, 429 U.S. 922 (1976); *In re* Storar, 420 N.E.2d 64 (N.Y. 1981). These cases, however, sought permission to terminate certain medical treatments, and did not include a claim for damages under a "wrongful living" cause of action. In Estate of Leach v. Shapiro, 469 N.E.2d 1047 (1984), an Ohio court of appeals addressed a cause of action for wrongfully placing and maintaining a patient on life-support systems, and held that damages could be recovered in such a situation. However, the court did not grant the requested relief based on a "wrongful living" cause of action. Instead, the court relied on the traditional tort claim of battery. Anderson is the first reported state court decision to directly address the "wrongful living" cause of action.

nized at common law as the "right to bodily integrity."[14] Since the United States Supreme Court decision in *Cruzan v. Director, Missouri Department of Health*, this individual right remains grounded in the constitutional right to privacy.[15] The right to refuse treatment has also been codified in law. Every state and the District of Columbia has enacted statutes permitting patients to control the course of their medical treatment during their final days.[16]

As advances in medical technology have kept people alive longer, the right to refuse life-sustaining treatment has taken on an even more crucial and urgent significance to dying patients and their families. While modern medicine may have learned to save lives, the lives it has saved are often severely diminished and filled with pain and suffering. Although the right to refuse life saving medical treatment is firmly embedded in our nation's laws, what to do when this right is ignored has not been firmly settled. Medical options at the patient's bedside have turned into vexing legal questions in the courtroom. The courts are increasingly called upon to solve the thorny dilemma of what remedy lies—or who "pays"—when a doctor sustains a patient who has asked to be left to die.[17]

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[14] *See In re* Storar, 420 N.E.2d at 70, where the court, quoting Cardozo, stated that every person "of adult years and sound mind has a right to determine what should be done with his own body."

[15] Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261 (1990). Nancy Cruzan was an adult female who suffered severe brain damage in an automobile accident and was left in a persistent vegetative state with no hope of recovery. *Id.* Her guardians requested termination of artificial hydration and nutrition. *Id.* The Supreme Court required clear and convincing evidence that a person wants their physician to withdraw treatment, and addressed for the first time whether the constitution protected "the right to die." *Id.* The Court stated: "[t]he Fourteenth Amendment provides that no State shall 'deprive any person of life, liberty, or property, without due process of law.' The principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions." *Id.* at 277-78. Regarding the basic principles of informed consent, see Slater v. Baker & Stapleton, 95 Eng. Rep. 860, 863 (K.B. 1767); Schloendorff v. Society of New York Hosps., 105 N.E. 92 (N.Y. 1914); Salgo v. Leland Stanford Jr. Univ. Bd. of Trustees, 317 P.2d 170 (Cal. Ct. App. 1957); Natanson v. Kline, 350 P.2d 1093 (Kansas 1960); Largeg v. Rothman, 540 A.2d 504 (N.J. 1988)(standard for adequate disclosure); Sard v. Hardy, 379 A.2d 1014 (Md. 1977)(content of disclosure); Zinermon v. Burch, 494 U.S. 113 (1990)(capacity to consent); *In re* Milton, 505 N.E.2d 255 (Ohio 1987)(refusal based on religious belief).

[16] These statutes cover a range of mechanisms to implement end-of-life decisions, including advanced directives, living wills, durable power of attorney, and "do not resuscitate" orders. For patients who have not written an advance directive, Congress has also recognized the importance of protecting an individual's choice in health care decisions making by passing the Patient Self-Determination Act. 42 U.S.C. § 1395 cc(a)(1)(Q), 1395 cc(f) 1994).

[17] In one survey of physicians in California, researchers found a significant percentage of physicians willing to ignore a patient's directive not to administer life-sustaining or life-saving treatment. Diane Redleaf *et al.*, Note, *The California Natural Death Act: An Empirical Study of Physician's Practices*, 31 STAN. L. REV. 913 (1979). The survey was sent to a wide range of specialties, including internists, general practitioners, neurologists, surgeons, and emergency room physicians. Eleven percent of responding

The *Anderson* court answered this question by "splitting the difference." It affirmed Winter's right to refuse medical treatment by determining that the medical provider had committed a battery against Winter when he was defibrillated despite a "do not resuscitate" order. However, the court refused to grant any damages because it determined that Winter had not suffered a compensable harm. The court recognized a right, but failed to provide a remedy.

Part One of this Article explores the court's legal analysis in *Anderson*, and whether the court's failure to find a remedy comports with traditional concepts of tort law and more recent and novel causes of action involving "damages for living," including wrongful pregnancy and wrongful life claims. Part Two addresses larger philosophical questions by taking a theological and Halachic (Jewish law) approach.

I. PART ONE

A. The Application of Traditional Tort Principles to Unwanted Medical Treatment

The *Anderson* court determined that the hospital had committed a battery when it resuscitated Winter because he had not consented to the defibrillation.[18] The court determined that Winter suffered no compensable damages because the defibrillation itself did not cause any direct harm such as broken bones or tissue burns.[19] It also found that the defibrillation, though it prolonged Winter's life, did not cause his subsequent stroke and other medical problems. A contrary determination would, in effect, permit recovery for

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physicians reported they would treat an eighty-year-old heart attack victim with artificial life support despite an advanced directive refusing such treatment. *Id.* Fourteen percent would ignore an advance directive and place a severely brain-damaged patient who was legally dead on a respirator. *Id.* Physicians may be willing to ignore advance directives because the majority of statutes that provide for advance directives, and other health care decision making mechanisms do not provide for sanctions against physicians who violate them. Only six states provide for civil or criminal liability against a physician who violates such a directive. *See* Tricia Jonas Hackelman, Comment, *Violation of an Individual's Right to Die: The Need for a Wrongful Living Cause of Action*, 64 U. CIN. L. REV. 1355 (1996). Hackelman also attributes a physician's failure to abide by an advanced directive to the paternalism that exists in the medical profession. *Id.* at 1362.

[18] A person commits the tort of battery if he acts with intent to cause harmful or offensive contact. *See* RESTATEMENT (SECOND) OF TORTS §§ 13, 18 (1965). It is well established that a medical provider who treats a patient without consent commits a battery. *See* Leach v. Shapiro, 469 N.E.2d 1047 (Ohio 1984). *In re* Gardner, 534 A.2d 947 (Me. 1987). Even if the treatment is beneficial or harmless, the patient is entitled to recover nominal damages. Lacey v. Laird, 139 N.E.2d 25 (1956). A negligence claim was also made in *Anderson*, under the theory that the nurse had a duty to honor the "no code blue" order and breached that duty when she performed the resuscitation. *See Anderson*, 614 N.E.2d at 841. The court acknowledged the existence of the negligence claim, but focused its discussion on the battery claim.

[19] *Anderson*, 671 N.E.2d at 229.

"wrongful living" damages, a claim the court refused to recognize under Ohio law.[20]

The court's failure to find causation, and hence damages, represents a strained and narrow application of the traditional concepts of tort law. The standard test in tort law for causation is the "but for" test, stated by Prosser as follows: "[t]he defendant's conduct is a cause of the event if the event would not have occurred but for that conduct; conversely, the defendant's conduct is not a cause of the event, if the event would have occurred without it."[21] Later events are generally considered proximately caused by an initial act if they are part of a natural unbroken sequence resulting from the act and are reasonably foreseeable.[22] However, not all later events will be considered caused by the original act. Otherwise, there would be no end to a defendant's liability. As stated by Prosser:

> In a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the discovery of America and beyond . . . But any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful acts, and would set society on edge and fill the courts with endless litigation.[23]

The *Anderson* court clearly acknowledged that Winter would have died without the defibrillation, and that, therefore, the stroke and other medical problems would not have occurred "but for" the defibrillation.[24] It even acknowledged that the occurrence of a stroke might have been reasonably foreseeable, given Winter's medical problems at the time he was resuscitated.[25] Thus, had the court followed the standard test for causation, it would have established the causal link between the defibrillation and Winter's medical condition. To escape this conclusion, the court invoked the specter of "infinite liability," and drew a quick and narrow line by requiring evidence that the defibrillation had actually caused bodily damage such as broken bones or tissue, or had been the physical cause of the stroke. To the court, the defibrillation simply prolonged Winter's life, but did not cause any of his subsequent medical problems.

The court drew such a line because to do otherwise would, in its view, permit recovery for "wrongful living," a theory the court rejected. The court stated that "[t]here are some mistakes, indeed even breaches of duty or technical assaults,

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[20] *Id.*

[21] W. Page Keeton *et al.*, PROSSER AND KEATON ON THE LAW OF TORTS § 41, at 266 (5th ed. 1984).

[22]. Strother v. Hutchinson, 423 N.E.2d 467 (Ohio 1981); Mudrich v. Standard Oil Co., 90 N.E.2d 859 (Ohio 1950).

[23] W. PROSSER, LAW OF TORTS (4th ed. 1971)(citation omitted).

[24] *Anderson*, 671 N.E.2d at 228.

[25] *Id.*

that people make in this life that affect the lives of others for which there simply should be no monetary compensation."[26] The court confused the tort elements of causation and damages, thus refusing to find causation, because it believed some errors should not be compensated. What caused Winter's medical condition after the defibrillation and for what damages he should be compensated require separate and distinct analyses, a subject avoided by the court. In effect, the court put the cart before the horse. It did not want to compensate Winter for his prolonged and diminished life after the resuscitation, so it used a restrictive analysis of causation to support its failure to do so.

By adopting such an unwarranted and narrow view of causation, the court emasculated the use of a traditional tort concept of battery to obtain damages from a health care provider who interferes with a patient's legal right to refuse life-sustaining treatment. Under *Anderson*, all the pain, suffering, and future medical problems caused when a medical provider ignores a patient's order not to administer life sustaining treatment are ignored; the patient is left with only the tissue burn or broken bones that may have resulted from the unwanted life sustaining medical procedure.

B. The Wrongful Living Claim and the Related Torts of Wrongful Pregnancy and Wrongful Life

The *Anderson* Court quickly dispensed with any notion that the legal system's response to the interference with the right to die should result in a new cause of action for wrongful living. The Court viewed a wrongful living cause of action as an attempt to seek damages for the prolongation of life caused by the medical provider's failure to heed the patient's instructions not to be treated. To the court, this was tantamount to putting a price tag on life, an attempt to measure "the relative merits of 'being versus nonbeing'."[27] Since it considered life not to be a compensable harm, the court concluded that there was no cause of action for wrongful living.[28]

Although wrongful living causes of action are relatively new,[29] an extensive body of case law exists on wrongful pregnancy and wrongful life causes of actions. These causes of actions are, in essence, a "mirror image" of the wrongful living cause of action. They occur at the other end of the life spectrum—birth. However, they share with the wrongful living cause of action the claim that a medical provider has negligently performed an act that resulted in an unwanted or impaired life. A wrongful pregnancy action is brought by parents

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[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *See supra* note 13.

after a negligent sterilization results in the unplanned birth of their child.[30] A wrongful life claim is brought by the child born impaired after a physician negligently fails to warn the parents of a genetic defect so that they could exercise their right to terminate the pregnancy.[31]

These causes of action involve the same knotty questions of causation and damages present in a wrongful living claim. Did the act of a physician "cause" a life to occur? If so, how do we value a life for the purposes of determining damages? Should one be compensated for an impaired or defective life? Constitutional rights are also implicated in several of these causes of action. For the wrongful pregnancy, it is the interference with the right to choose when to procreate.[32] For a wrongful living claim, it is the liberty interest in refusing unwanted medical treatment.[33]

Ohio first recognized a wrongful pregnancy claim in 1976 in the case of *Bowman v. Davis*, when it permitted a woman to recover damages after the birth

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[30] A wrongful pregnancy claim was first recognized by a state court in 1967, when a California court permitted a child's parent to recover damages, including the costs of raising a child, after a negligently performed sterilization. Custodio v. Bauer, 59 Cal. Rptr. 463 (Ct. App. 1967). *See also* Troppi v. Scarf, 187 N.W. 511 (Mich. Ct. App. 1971)(permitting the parents of a healthy child to recover damages from a pharmacist); Bowman v. Davis, 356 N.E.2d 496 (Ohio 1976)(permitting recovery for the birth of twins after a negligent sterilization); Johnson v. Univ. Hosp. of Cleveland, 540 N.E.2d 1370 (Ohio 1989)(permitting recovery of limited damages for the birth of a child after a negligent sterilization).

[31] The recognition of a wrongful life claim came in Curlender v. Bio-Science Lab., 165 Cal. Rptr. 477 (Ct. App. 1980), when the parents of a child born with Tay-Sachs disease was granted damages because of a negligently performed genetic test. *See also* Turpin v. Sortini, 643 P.2d 954, (Cal. 1982) (child born deaf may recover special damages after physician failed to warn parents of possibility of hereditary deafness); Prochanick v. Cillo, 478 A.2d 755 (N.J. 1984) (damages for extraordinary medical expenses but not emotional distress awarded when defendant physician negligently failed to warn mother of the dangers of contracting german measles during pregnancy); Azzolina v. Dingfelder, 322 S.E.2d 567 (N.C. Ct. App. 1984); Harbeson v. Parke-Davis, Inc., 656 P.2d 483 (Wash. 1983) (extraordinary expenses permitted due to congenital birth defect). The parents of a child born with a genetic defect can bring their own separate cause of action for wrongful birth. This cause of action has also been recognized by most jurisdictions. *See* Berman v. Allan, 404 A.2d 8 (N.J. 1979); Schroeder v. Perkel, 432 A.2d 834 (N.J. 1981); Becker v. Schwartz, 386 N.E.2d 807 (N.Y. 1978); Speck v. Finegold, 439 A.2d 110 (Pa. 1981); Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975). For a more thorough understanding of wrongful life, see Elizabeth F. Collins, *An Overview and Analysis: Prenatal Torts, Preconception Torts, Wrongful Life, Wrongful Death, and Wrongful Birth: Time for a New Framework*, 22 J. FAM. L. 677 (1984); Frank B. Potts, *Torts—Wrongful Life—Infant's Right to Sue for Negligent Genetic Counseling*, 48 TENN. L. REV. 493 (1981); Thomas K. Foutz, Comment, *"Wrongful Life:" The Right Not to be Born*, 54 TUL. L. REV. 480 (1980); Marten A. Trotzig, *The Defective Child and the Actions for Wrongful Life and Wrongful Birth*, 14 FAM. L.Q. 15 (1980).

[32] Roe v. Wade, 410 U.S. 113 (1973).

[33] *See supra* note 15.

of twins following a negligently performed sterilization.[34] In contrast to its later decision in *Anderson*, the *Bowman* court was untroubled that the plaintiff was, in effect, seeking damages for a life. Indeed, the court explicitly rejected the argument made by the defendant that public policy prohibited the recovery of damages for the "wrongful life" of a child, and emphasized that it was not a wrongful life with which they were dealing, but a traditional negligence action.[35] The court affirmed an award of $450,000 in general damages and $12,500 in special damages.[36]

In 1989, the Ohio Supreme Court affirmed its recognition of a wrongful pregnancy claim in *Johnson v. University Hospital of Cleveland*.[37] Again, the court had none of the problems it later demonstrated in *Anderson*, when it applied traditional tort principles of causation to a negligent medical act that results in life. Although the court cited the "infinite liability" conundrum,[38] it did not use it to find that the doctors' negligent sterilization "caused" the birth of a child. To the contrary, the court found that there "certainly . . . was a duty and a breach of that duty which was the proximate cause of damage."[39]

It is difficult to reconcile the *Johnson* court's analysis of causation with its subsequent analysis of causation in *Anderson*. If a doctor's negligent sterilization can be considered, for tort purposes, the cause of a life, then certainly an unwanted resuscitation can be considered the cause of a prolonged and impaired life. Indeed, one can make a stronger argument for cutting the chain of causation at birth, in contrast to stopping it at prolonging the life of a person who has made an informed and highly personal decision to control the manner of his death.

The *Johnson* court's analysis of the appropriate damages in a wrongful pregnancy claim also differs markedly from its treatment of the damage issue in *Anderson*. The *Johnson* court acknowledged the vexing question of whether life can be considered a compensable injury. It declined to apply the "strict rules of tort . . . to an action to which they are not suited . . . ."[40] However, it rejected a rule that would prohibit any recovery for damages in wrongful pregnancy cases as being "clearly in conflict with the traditional concepts of tort law."[41] Instead, it adopted a "limited damages" rule and refused to award the costs of child rearing because "the birth of a normal, healthy child cannot be an injury

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[34] Bowman v. Davis, 356 N.E.2d 496 (Ohio 1976).

[35] *Id.* at 499.

[36] *Id.* at 498.

[37] *Johnson*, 540 N.E.2d at 1370.

[38] *Id.* at 1377.

[39] *Id.* at 1378.

[40] *Id.*

[41] *Id.*

to her parents."[42] The court permitted the plaintiff to recover damages related to the pregnancy itself, including the medical expenses of pregnancy and birth and any emotional distress, pain and suffering during the pregnancy and birth.[43] This approach is consistent with the vast majority of jurisdictions which have adopted a limited damages rule that prohibits recovery of child rearing expenses while permitting at least some recovery for other types of damages.[44]

This approach parallels one used by several courts in a wrongful life cause of action where negligent genetic counseling or similar error results in the birth of an impaired child.[45] A child born with an impairment also raises the dilemma of comparing "being to non-being," but with the added twist of contrasting existence in an impaired state with no existence at all. When California first recognized a wrongful life tort in *Curlender v. Bio-Science Lab.*, it permitted a child born with Tay-Sachs disease to recover general damages, including damages for the pain and suffering and any financial losses resulting from the impaired condition.[46] The court found that "neither the difficulty of measuring damages nor the sanctity of life was a bar to recovery."[47] The court emphasized that the child was not being compensated for being born, but for the child's impairment.[48]

This holding was limited by the California Supreme Court in *Turpin v. Sortini*, when the court refused to award general damages to a child born deaf because a medical care provider negligently failed to advise the child's parent before conception of the possibility of this hereditary condition.[49] The court declined to award general damages, because such an award would require weighing the value of not being born against the value of being born deaf.[50] However, the

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[42] 540 N.E.2d at 1378.

[43] *Id.*

[44] The first case which recognized a wrongful pregnancy cause of action was Custodio v. Bauer, 59 Cal. Rptr. 463 (Ct. App. 1967). The court permitted the parents to recover the cost of raising an unplanned child. *Id.* However, as more and more courts accepted the wrongful pregnancy cause of action, a more limited approach to damages evolved to avoid placing a value on a child's life. *See* Public Health Trust v. Brown, 388 So.2d 1084 (3d Dist. 1980); Terrell v. Garcia, 496 S.W.2d 124 (Tex. App. 1973); Coleman v. Garrison, 349 A.2d 8 (Del. 1975); Byrd v. Wesley Med. Ctr., 699 P.2d 459 (Kan. 1985). Several jurisdictions have adopted a "benefits rule" which allows expenses for child rearing but "deducts" the value derived from the benefits of having a child. *See* Sherlock v. Stillwater Clinic, 260 N.W.2d 169 (Minn. 1977); Univ. of Arizona Health Sciences Ctr. v. Superior Court, 667 P.2d 1294 (Ariz. 1983); Jones v. Malinowski, 473 A.2d 429 (Md. 1984).

[45] *See supra* note 27.

[46] Curlender v. Bio-Science Lab., 165 Cal. Rptr. 477 (Cal. Ct. App. 1980).

[47] *Id.*

[48] *Id.* at 489.

[49] Turpin v. Sortinin, 643 P.2d 954 (Cal. 1982).

[50] *Id.* at 956.

court permitted the recovery of the extraordinary expenses required to treat the deaf child. Other courts that have considered the issue, have also been hesitant to award general damages, limiting awards to extraordinary damages associated with raising an impaired child.[51]

Thus, in wrongful pregnancy and wrongful life causes of action, courts have fashioned remedies that avoid placing a value on life and instead focus on the extraordinary expenses incurred after a negligent act by a medical provider. In many cases, this means payment of medical or extraordinary expenses related to the pregnancy or the impairment,[52] or even the costs of raising an impaired child.[53] While damages for pain and suffering or emotional distress are generally denied because they devalue life,[54] even these types of damages may be appropriate in certain circumstances.[55]

Wrongful living claims lend themselves to the same analysis. At the very least, a plaintiff should be able to recover any medical expenses incurred after the unwanted medical treatment. Such an award is straightforward, easy to calculate, and does not require weighing the value of a life. Damages for pain and suffering are more problematic. Regardless, they should also be recoverable, not for the prolongation of life, but based on the extent to which the person's life has been diminished and impaired.[56] The concept of placing a value on an impairment is well grounded in law. It is routinely made in tort cases when, for example, the loss of an arm is assigned a value, as is the plaintiff's pain and suffering for losing the arm.

The *Anderson* decision represents a setback to those who would use the courts as a remedy when doctors fail to heed the patient's decision to forego life-saving medical procedures. Not only did the court explicitly reject a wrongful living cause of action, it also made it more difficult to use the traditional tort of battery against a physician who treats a dying patient without consent.

Negligent or other tortious conduct by medical professionals, whether it occurs at the inception or the end of life, requires a deterrent. Other courts have found a way to award at least some damages for wrongful pregnancy or wrongful life claims, even though these claims also raise the problem of how to value a life. The result in *Anderson* affords doctors who ignore "do not

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[51] *See supra* note 27.

[52] *See supra* notes 26 and 27.

[53] *See Prochanick*, 478 A.2d at 755; *Johnson*, 540 N.E.2d at 1370.

[54] *See Prochanick*, 478 A.2d at 755.

[55] *See Johnson*, 540 N.E.2d at 1370 (damages for pain and suffering were limited to the time period of the pregnancy and the birth and not for the burden of raising a child).

[56] The proposition that an award for suffering would not constitute damages for merely prolonging life is demonstrated by the following hypothetical: Assume after his resuscitation, Mr. Winter made a sudden and spontaneous recovery and his health was restored. He would then not be entitled to any damages because although his life was prolonged, it was not impaired.

resuscitate" orders more immunity from liability than doctors who perform negligent sterilization procedures or faulty genetic testing or counseling.

A patient's right to make end-of-life decisions, including the right to refuse life-saving medical treatment, has been recognized by every state and is protected by the Constitution. This right will be rendered meaningless if the courts fail to provide a remedy for its violation.

II. PART TWO

To properly comment on this case, we must ascertain the attitude of Jewish Law ("halacha") towards euthanasia and informed consent and determine if there is any way to assess damages for "wrongful living." Because the attitude of halacha towards euthanasia has already been discussed at great length,[57] this section emphasizes theological issues relating to the "ownership" of human life, and the value of a life of suffering.

A. Euthanasia

Discussions of euthanasia usually distinguish between active and passive euthanasia. Active euthanasia is when some action is taken to end a patient's life, such as giving the patient an overdose of medicine. Passive euthanasia is when various forms of life support are removed and the patients die because of their own weaknesses. Virtually all interpretations of Jewish law agree that active euthanasia is forbidden under all circumstances. It is also forbidden for patients to take their own life, even if the patients are in extreme pain and have no prospects of surviving their present illness.[58] Active euthanasia is forbidden even in the last moments of life. The Talmud states that touching, or even closing the eyes of a "goses"[59] (a patient who is nearing death) is considered to be murder.

There is some discussion regarding if and when passive euthanasia would be acceptable according to halacha. One authoritative source, the Rama,[60] says that if someone is about to die, but some outside stimuli is preventing death

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[57] Discussions in English about the Jewish attitude towards euthanasia include: IMMANUEL JAKOBOVITS, JEWISH MEDICAL ETHICS 123-126 (1959); J. David Bleich, *The Quinlan Case: A Jewish Perspective in* FRED ROSNER & J. DAVID BLEICH, JEWISH BIOETHICS 266-277 (1979); FRED ROSNER, MODERN MEDICINE AND JEWISH ETHICS 197-247 (1991); J. DAVID BLEICH, JUDAISM AND HEALING: HALAKHIC PERSPECTIVES 134-146 (1981); BASIL F. HERRING, JEWISH ETHICS AND HALAKHAH FOR OUR TIME 67-91 (1984); NOAM ZOHAR, ALTERNATIVES IN JEWISH BIOETHICS 37-69 (1997); MOSHE DAVID TENDLER, RESPONSA OF RAV MOSHE FEINSTEIN VOLUME I 38-67 (1996).

[58] There are some opinions that allow suicide in exceptional cases. See *Besamim Rosh* 345 (The Besamim Rosh had a great deal of influence on some earlier halachic authorities, but it is generally accepted by contemporary authorities to be a forgery.) *See also* HERRING, *supra* note 57, at 75-78. For a more liberal approach to suicide, see ZOHAR, *supra* note 57, at 49-68.

[59] *Shabbat* 151b.

[60] *Yoreh Deah* 339:1.

from occurring, one may remove those outside stimuli to allow death to occur. The examples he gives are the noise of wood being chopped and salt on the tongue, both of which are assumed to prevent the dying process. In both of these cases, it is permitted to stop the chopping and remove the salt so that the dying person can die in peace. The Beit Ya'akov goes even further than the Rama, and states that it is *forbidden* to administer medicines to delay death in a terminally ill patient with a very short time to live and who is in great pain.[61]

There are two possible reasons for this prohibition against prolonging the death process. One is that it is forbidden to cause a patient unwanted pain (in an instance where withdrawal of life support would be warranted by halacha). Another is that continuing the life of a patient who is about to die defies God's will and the natural process of death.[62] Other interpreters are of the opinion that it is forbidden to withdraw treatment in any situation.[63] How do these opinions interpret the Rama's ruling about removing the woodchopper? One answer given is that the allowance to remove the woodchopper is applicable only in the very last moments of life, when the pain of death is particularly excruciating.[64] Another possible explanation of the woodchopper case, according to these authors, is that one may remove a woodchopper because it is a "segulah," a non-scientific form of therapy. Removing a scientifically tested form of therapy would not be allowed in any case.[65]

From the above, we see that, according to halacha, even those opinions that allow passive euthanasia allow it only in very few cases. The fact that opinions exist which forbid passive euthanasia in every case, and require medical intervention in all instances, is of great significance to a halachic perspective on *Anderson v. St Francis-St. George*. Normally, in a case where there is a dispute among acknowledged halachic authorities, any defendant can avoid financial responsibility if an established and accepted halachic opinion supports his claim.[66] Thus, in this instance, the opinion of those who disallow passive euthanasia in all cases would be sufficient to exempt the doctors from financial responsibility.

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[61] *Yoreh Deah* 339:1. This view is followed by RABBI MOSHE FEINSTEIN, IGGROT MOSHE, *Choshen Mishpat* II:73-75. For an English synopsis of Feinstein's opinion, see TENDLER, *supra* note 57, at 38-67.

[62] *See* 13 ELIEZER WALDENBERG, TZITZ ELIEZER §§ 10, 14 (1967).

[63] *Shevut Ya'akov* 1:13. *See also Yoreh Deah* 339:1.

[64] 13 WALDENBERG, *supra* note 62, at § 10, 14.

[65] *See generally* BLEICH, supra note 57.

[66] This is the concept of "kim li," or "it has been established for me." *See Choshen Mishpat* 25.

B. Informed Consent

The basis of *Anderson v. St Francis-St. George* is the right to die, which is recognized in *Cruzan v. Director, Missouri Dept. Of Health*.[67] This right is based on the constitutional right to privacy, and the common law right to informed consent. This right further assumes that the individual's liberty interest is the primary consideration in deciding the case. Halacha takes a very different approach to informed consent. Virtually all opinions accept that a patient has no right to refuse beneficial treatment, and a doctor may disregard a patient's instructions.[68] There are some instances where a limited form of consent is recognized. Passive euthanasia, according to those who allow it, is one example where informed consent is accepted. In addition, in a case where a patient seemingly has only a short time to live and an operation holds out the possibility for complete recovery or instant death, some are of the opinion that it is the patient's decision whether or not to operate.[69] Clearly, halacha does not see informed consent as a basic right, but does allow it in select cases.

C. The "Ownership" of Human Life

What is the theoretical basis to halachic opposition to informed consent? Some sources question the competency of the patient and the patient's family to arrive at an appropriate decision. When surrounded with a great deal of pain and suffering, people may make rash, imprudent decisions that they may regret later.[70] Some even question the competency of doctors to assess when a patient has no hope of living.[71] However, in large part the opposition to the legitimacy of informed consent rests on the belief that only God may take a human life. Life, and even the human body, are gifts from God, and can only be taken away by God Himself.

Proof for this belief is found primarily in laws against self-injury and suicide in halacha. However, there is some debate about aspects of each of these laws. The Talmud[72] records a disagreement regarding whether or not self-injury is allowed. A medieval authority, Rabbeinu Gershom, is of the opinion that one is allowed to injure himself.[73] The Perisha explains that this would only be in

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[67] *Cruzan*, 497 U.S. at 261.

[68] *See Magen Avraham Orach Chaim* 328:6; *see also* BENJAMIN FREEDMAN, DUTY AND HEALING: FOUNDATIONS OF A JEWISH BIOETHIC 19-24, 68-74 (1996). Freedman argues for the possibility of a halachically acceptable doctrine of informed consent. *Id.* However, this opinion has not been accepted by contemporary halachic authorities. It should be noted there is no point in coerced treatment if the patient's condition will worsen because of the coercion, and great care must be taken when coercing treatment.

[69] ABRAHAM S. ABRAHAM, NISHMAT AVRAHAM 44-48 (1985).

[70] 5 WALDENBERG, *supra* note 62, at ch. 5. *See also* BLEICH, *supra* note 57, at 143-44.

[71] *See* BLEICH, *supra* note 57, at 270-272.

[72] *Bava Kama* 91b.

[73] *Shitah Mekubetzet, Bava Kama* 91b; *Tur Choshen Mishpat* 420.

a case where there is no permanent damage to the body.[74] The majority of opinions, and contemporary consensus, is that it is forbidden to inflict injury on oneself.[75] There is also a disagreement if one may injure another person if given permission. Some say there is no prohibition;[76] others disagree strongly, saying no one can grant permission to another to injure one's body.[77] Rabbi Shlomo Zevin argues that the prohibition against self injury, and the prohibition against injuring another, even when permission is given, is valid halacha because the body belongs to God, and not to humans.[78] Similarly, laws against suicide are seen as protecting human life, which belongs to God.[79]

One area where there is further disagreement over this concept relates to the obligation to save the lives of people committing suicide. There is an obligation under Jewish law to save the lives of people who are in danger. The Talmud[80] derives this rule from the biblical verse "you should not stand idly by the blood of your neighbor."[81] The obligation to save lives is compared to the obligation to restore lost property. Based on this comparison, some argue[82] that the obligation to save another life is operative when the person in danger is not committing suicide. If the person in danger is committing suicide, there is no obligation to save him. This is similar to a person who is consciously throwing away his property, where there is no obligation to restore lost property. Others disagree with this ruling and say there is an obligation to save another's life, even if he is committing suicide, because life belongs to God.[83]

While the preponderance of halachic material supports the claim that the human body is viewed as God's possession, other opinions dispute God's ownership.[84] The idea that God's interest in human life takes precedence over any human interest is the driving force behind halachic opposition to the concept of informed consent.

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[74] Tur Shulchan Aruch, *Choshen Mishpat* 420:21.

[75] *Id.* at 420:31.

[76] *Minchat Chinnuch* 48.

[77] *Chavot Yair* 163.

[78] *L'Or HaHalacha* 218-35. *See generally* WALDENBERG, *supra* note 62. *See also Ramat Rachel* 29.

[79] *L'Or HaHalacha* 218-35.

[80] *Sanhedrin* 73a.

[81] *Leviticus* 19:16.

[82] *Minchat Chinuch* 237.

[83] *Zevin* 322-323.

[84] *See Zevin*, 332-333 (response to the arguments of Rabbi Shaul Yisraeli).

D. Quality of Life and Value of Life

Assuming a patient may refuse treatment at times, what type of damages can be assessed? Medical intervention done against the patient's will does not usually directly cause a patient's pain and suffering. By allowing the patient to live, it prolongs the illness and suffering the patient already has, or allows the patient to contract other illnesses that will cause pain and suffering. In either instance, therapy only prevents the patient from alleviating their suffering (in this case, by dying), but does not directly cause the suffering. Such action would be considered "maniat revach," or "preventing a profit," and the physician would not be liable for the pain and suffering.[85] However, even assuming that, according to halacha, one could reward damages for indirect injury, a more general issue needs to be discussed: What is the value of a life filled with suffering? Is it inferior to not having a life at all, or is it always better to live, even if the life is filled with suffering? If life is better, even with pain and suffering, then no injury has even occurred. Damages for "wrongful living" can only exist is if the life one is left with is worse than not living at all.

Several Talmudic statements may be cited to determine the value of a life of suffering. Some argue that there are times that a life of suffering is so terrible that we can objectively say the person is better off dead.[86] The Talmud tells the story of the execution of Rabbi Chanina Ben Teradyon, who was burned to death. During the execution, wet tufts of wool were placed on his chest to prolong the execution. Rabbi Chanina's executioner is lauded for repenting, and then, speeding up Rabbi Chanina's execution, allowing Rabbi Chanina to die a speedy death.[87]

Another Talmudic statement concerns Choni Ha'Magel, who falls asleep for seventy years. After he awakes, he discovers he has no living family and friends, and is so distraught because he has no contemporaries that he prays to die.[88]

The Talmud also implies in some instances that extreme suffering is a fate worse than death. The Talmud says that, had Hannaniah Mishael and Azaraiah (who were thrown into a fiery furnace rather than bow to an idol)[89] been tortured, they would have submitted and worshipped the idol.[90] Some say that

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[85] TUR SHULCHAN ARUCH, *Choshen Mishpat* 420:11. For more on liability for indirect causation in halacha, see Mark Dratch, *Suing Your Rabbi: Clergy Malpractice in Jewish Law*, J. OF HALACHA & CONTEMP. SOC'Y XVIII 66-76 (Fall 1989).

[86] TENDLER, *supra* note 57, at 75-83, 135-148.

[87] *Avodah Zarah* 18a. *See also Berachot* 8a (emphasizing the importance of a painless death).

[88] *Taanit* 23a.

[89] *Daniel* ch. 3.

[90] *Ketubot* 33b.

this is an allowance to commit suicide in cases when extreme, unending torture will occur.[91]

A much discussed episode in the Talmud is the story about Rabbi Yehuda the Prince, who was ill and about to die. His students prayed that he should live, and this prayer sustained him. His maidservant, seeing his suffering, broke an urn to startle them and stop their prayer—and at that moment Rabbi Yehuda the Prince died.[92] This statement is interpreted by the Ran[93] as allowing one to pray for terminally ill patients to die if they are suffering, and is used as a proof by Rabbi Moshe Feinstein to allow the withdrawal of some forms of medical treatment for suffering, terminally ill patients.[94]

Rabbi Eliezer Waldenberg takes a different view of this text.[95] He sees the actions of the students of Rabbi Yehuda the Prince as more normative. He notes that other medieval authorities do not explicitly state their agreement with the Ran's interpretation, and seem to imply disagreement. He allows for prayer that a patient may die, only after all other means, medical and spiritual, have been exhausted and the patient shows no improvement. At that point, only non-family members may pray for the patient's death. This may be allowed because we do not believe family members, who are closest to the patient's suffering, are objective enough to decide when to pray for the patient's death.

The Talmud says that one moment in this world with repentance and good deeds is better than all of the world to come.[96] Elsewhere, the Talmud says that it is a reward to live in suffering rather than die immediately.[97]

III. CONCLUSION

Unlike American law, halacha generally discourages any removal of medical treatment. In most cases, halacha rejects the notion of informed consent and proscribes that medical intervention may occur against the patient's will. This view is based on the belief that the human body and life belongs to God, and that no person has the right the destroy God's property. Even according to the opinions that allow (and warrant) euthanasia in certain cases, no damages would be recoverable in *Anderson v. St. Francis-St. George*, because the defendants could apply a defense based on the opinions of those who never allow euthanasia. In addition, under halacha the defendants in *Anderson v. St. Francis-St. George* did not directly damage the patient by resuscitating him. The

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[91] *Shitah Mekubetzet, Tosfot, Gittin* 57b. *See Iggrot Moshe Orach Chaim* 5:13 for a different interpretation. For more on suicide in Halacha, *see* HERRING, *supra* note 57, 74-78, and ROSNER, *supra* note 57, at 247-63.

[92] *Ketubot* 104a.

[93] *Nedarim* 40a.

[94] *Iggrot Moshe, Choshen Mishpat* II, 73.

[95] 5 WALDENBERG, *supra* note 62, at § 10, § 14 ch. 5. *See* BLEICH, *supra* note 57, at 143-144.

[96] *Avot* 4:17.

[97] *Sotah* 20a. *See generally* WALDENBERG, *supra* note 62. *See also Ramat Rachel* 29.

defendant's only prevented death from occurring, which is not classified as a form of damage for which one is liable in halacha. Even if rescuscitation were considered to be a direct damage, it is debatable if saving an unwanted life of suffering can be considered a damage compared to death.